

STATE OF MICHIGAN
COURT OF APPEALS

KAREN BYRD, individually and as Next Friend
for, LEXUS CHEATOM, minor, PAGE
CHEATOM, minor, and MARCUS WILLIAMS,
minor,

Plaintiff-Appellant,

v

OLIVER RILEY, and MAXINE RILEY,

Defendants-Appellees,

and

KENNETH RILEY, and KONTINENTAL 2000
MORTGAGE SERVICES, L.L.C.

Defendants.

Before: Murray, P.J., and Smolenski and Servitto, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition to defendants Kenneth Riley and Kontinental 2000 Mortgage Services, L.L.C.¹ We reverse and remand for further proceedings consistent with this opinion.

Plaintiff purchased a home from Oliver² and Maxine Riley in the City of Detroit in August 1999. Plaintiff financed this purchase by obtaining a mortgage from defendants. Subsequently, plaintiff's minor children suffered from lead poisoning, and plaintiff was ordered to undertake measures to remediate exposed lead-based paint conditions in the home. Plaintiff

¹ Plaintiff settled with defendants Oliver and Maxine Riley after the trial court granted defendants' motion for summary disposition. The Rileys are not party to this appeal.

² Oliver Riley is defendant Kenneth Riley's brother.

then commenced the instant action against defendants, alleging that defendants acted as both her real estate agent and her mortgage broker, as well as acting as real estate agent for the Rileys during plaintiff's purchase of the home. Plaintiff further alleged that in their capacity as real estate agent for both parties, defendants "carelessly, negligently, willfully, recklessly and wantonly disregarded and violated their duties" to her, by: failing to inform her of the presence or likely presence of lead-based paint in the home; misrepresenting and fraudulently concealing the condition of the home and the existence and dangers of lead-based paint hazards; failing to make reasonable inspection and perform necessary repairs; failing to apply for a City of Detroit inspection; failing to obtain and file, or to advise plaintiff to obtain and file, a Certificate of Approval from the City of Detroit; and failing to provide plaintiff with a Seller's Disclosure Statement, a lead disclosure form, the United States Environmental Protection Agency's pamphlet on addressing lead hazards in the home and other materials required by law.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10), asserting that they served only as a mortgage broker and not as a realtor during the transaction, and therefore, that they owed plaintiff no duty relating to the condition of the property or any required disclosures from the sellers. The trial court agreed, concluding that because defendant Kenneth Riley was not a licensed real estate agent at the time of the transaction, defendants were not liable for any defects in the home.³

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003); *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 30; 651 NW2d 188 (2002). In reviewing an order granting summary disposition under MCR 2.116(C)(10), a reviewing court examines all relevant documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists on which reasonable minds could differ. *Shirilla v Detroit*, 208 Mich App 434, 437; 528 NW2d 763 (1995). All reasonable inferences are to be drawn in favor of the nonmovant. *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Plaintiff's complaint appears to set forth claims sounding in fraud and negligence.⁴ To establish a claim of fraudulent misrepresentation, a plaintiff must establish that, "(1) the

³ Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). The trial court did not articulate under which rule it was acting in granting the motion. However, the trial court determined that it was undisputed that defendant was licensed only as a mortgage broker and not as a real estate agent at the time plaintiff purchased the home, and therefore, that defendants were entitled to judgment as a matter of law because, as a mortgage broker, they lacked any legal duty to warn a buyer of alleged defects in the home. Where a motion for summary disposition is brought under both MCR 2.116(C)(8) and (C)(10), but the parties and the trial court relied on matters outside the pleadings, review under (C)(10) is the appropriate basis for review. *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997).

⁴ Plaintiff's complaint contains no separate headings for any claims, but contains just generalized
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defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage.” *M&D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998) (citation omitted). Alternatively, a plaintiff may establish fraud by nondisclosure, where the defendant suppressed a material fact, which the defendant was, in good faith, duty-bound to disclose. *Id.* at 28-29. “[A] representation can be action or conduct and can be actionable as silent fraud if that action or conduct is intended to create a misimpression to the opposing party.” *Id.* at 33.

Defendants’ principal arguments on appeal are (1) that they had no duty to disclose anything regarding the condition of the house because they acted solely as a mortgage broker, and (2) that no facts support plaintiff’s assertion that defendants acted as a real estate broker. Defendants’ arguments are both factually and legally incorrect.

It is true, as defendants argue, that in *Metheny v Coy-Magee Custom Builder, Inc*, 121 Mich App 580; 329 NW2d 428 (1982), we held that a mortgage “lender has no affirmative duty as part of the mortgage loan process to test” the home for the defects alleged in that case. *Id.* at 583 (emphasis added). However, in this case plaintiff alleges that defendants duty did not arise “as part of the mortgage loan process”, but instead through defendants’ actions as de facto real estate agents. Thus, *Metheny* is not dispositive of this case, and we must resolve the factual deficiencies claimed to exist by defendants.

According to our review of the deposition testimony submitted to the trial court, plaintiff testified that she called Hall’s Mortgage, seeking to purchase a yet-to-be found three bedroom home for which they would approve her. Plaintiff spoke with defendant, who told her that they could help her, as “that was what [they did].” After speaking to and making an appointment with defendant, plaintiff was met by Bruce White, who defendant said was his “middleman.” According to plaintiff, White gathered plaintiff’s financial information and later advised her that defendants could finance plaintiff for a home, with White specifically providing plaintiff with two homes to look at, including the Rileys’ home. Additionally, about a month before the closing, plaintiff went to defendants’ office to inquire regarding the status of the transaction and, while White was present, plaintiff informed defendant Kenneth Riley that she was going to have the home inspected. According to plaintiff, defendant told her that it was not necessary for her to do so because the inspections were “up to date” and the home had already passed a city inspection.

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allegations of wrongful conduct. This is not in conformity with the court rules. MCR 2.111(B)(1). At this juncture, we also cannot conclude that plaintiff has adequately alleged a violation of 42 USC 4851 *et seq.* The sole allegation regarding this law was in reference to how defendants acted negligently or recklessly, and not as an independent cause of action. Whether amendment of the complaint may occur to make it more specific is a matter best left to the trial court’s discretion.

Moreover, defendant Kenneth Riley testified that plaintiff was seeking both a mortgage and a house and that obtaining a mortgage and finding a house to purchase “go hand-in-hand.” He acknowledged that White approached him to find a home for plaintiff and that he provided White with information relating to the Rileys' home. And, Oliver Riley testified that White presented plaintiff's purchase agreement to him.⁵

In light of the above, the evidence at least arguably supports plaintiff's position that defendant Kenneth Riley, individually or through White, who was acting as his agent, acted in the capacity of a real estate agent towards plaintiff.⁶ The evidence, as noted, provided that defendants knew plaintiff was looking for a home and for financing, that defendants admitted that the two go hand-in-hand, and that defendants gave plaintiff the information about the house purchased, and affirmative representations about the condition of the house, and recommended not having a city inspection because one was already completed (though there was no evidence one was performed). This evidence could allow a jury to conclude that defendants' purpose was to induce plaintiff to forego an inspection and proceed with the purchase in order that defendants would receive the fees associated therewith. This evidence was enough to create a genuine issue of material fact regarding whether defendants committed fraudulent misrepresentations.

In ruling as it did, the trial court focused exclusively on whether defendant was *licensed* as a real estate agent, instead of evaluating the admissible evidence presented to determine whether there were any genuine issues of material fact as to defendants' actual conduct in the instant transaction. The trial court also gave no outward consideration to plaintiff's testimony that defendant affirmatively misrepresented the condition of the property.⁷ Hence, contrary to the trial court's determination, we conclude that, when viewed in a light most favorable to plaintiff, plaintiff's deposition testimony, together with the other admissible evidence⁸ submitted

⁵ Interestingly, the Rileys paid six per cent of the sale price of the house to defendants, allegedly towards plaintiff's closing costs.

⁶ Although plaintiff testified that she did not hire a realtor to find her a house, this does not detract from her testimony as to the promises, acts and representations made by defendants with regard to plaintiff finding and purchasing the Rileys' house.

⁷ Defendants also argue that plaintiff cannot now assert that defendant Kenneth Riley misrepresented the property's inspection status, because that allegation is not contained in the complaint. However, plaintiff's complaint alleges, *inter alia*, that defendants failed to have the property inspected by the City of Detroit or to inform plaintiff that such inspection was required; that defendants misrepresented and intentionally concealed the condition of the property; that defendants failed to make reasonable inspection of the property, to provide plaintiff with an opportunity to inspect the property or to apply for a City of Detroit inspection; and that defendant fraudulently concealed the dangers of lead-based paint and hazards at the property. Testimony that defendants advised plaintiff that the property passed a City inspection, that the property inspection was “up to date” and that defendant encouraged plaintiff not to have the home inspected is relevant to each of these allegations, and does not set forth a new theory of fraud.

⁸ This evidence includes plaintiff's receipts for fees paid to White and/or defendants, bearing defendant Kontinental's address and signed by White before Kontinental was licensed to do business as a mortgage broker, as well as underwriting documents bearing White's and
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to the trial court, was sufficient to create a genuine issue of material fact as to (1) the actual scope of defendants' role in the transaction and (2) to establish the elements of fraud.

To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation; and (4) damages. *Henry v Dow Chemical Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). As noted above, the trial court determined that because defendant Kenneth Riley was not a licensed real estate agent when plaintiff purchased the home, defendants had no duty to plaintiff to warn of any alleged defects in the property. However, as discussed above, the law is not so straightforward, and the trial court gave no consideration to the question whether defendant *acted* as a real estate agent, regardless of whether he was licensed to do so. And, just as importantly, there was sufficient evidence presented to establish a genuine issue of material fact as to defendants' actual role in selling the house to plaintiff. Therefore, summary disposition on plaintiff's negligence claim also was unwarranted.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Michael R. Smolenski

/s/ Deborah A. Servitto

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defendants' names in the same context.